

are making too much of it, that empathy sounds fine to me; I don't have any problem with that. Empathy is great, perhaps, if you are the beneficiary of it. The judge is empathetic with you, your side of the argument, but it is not good if you are on the wrong side of the argument, if you don't catch a judge's fancy or fail to appeal to a shared personal experience.

This approach to judging, as expressed in her speeches and writings, appears to have played an important part in the New Haven firefighters' case Senator MCCONNELL mentioned earlier. These are the 17 firefighters who followed all the rules, studied for the test. It was publicly set out how the promotions would take place in that department. A number of people passed, but a number of people did not, and there were a number of minorities who did not pass. They wanted to change the test after it had been carried out, to change the rules of the game after it had been carried out because they did not like the results. This is a results-oriented question.

Bowing to political pressure, the city government looked only at the test results and the statistical data and changed the rules of the game. They threw out the test. This was challenged by the persons who passed. The district judge then agreed with the city in a 48-or-so-page opinion. It was appealed to Judge Sotomayor's court. In one paragraph only, she agreed with that decision, even though it raised fundamental, important constitutional questions, important questions.

She concluded that the complaining firefighters were not even entitled to a trial, that the pretrial motions were sufficient to deny them the remedy they sought and to affirm the city's opinion in one paragraph.

The U.S. Supreme Court disagreed. They wrote almost 100 pages in their opinion, and all nine Justices voted to reverse the opinion. It was not 5 to 4. Five of the Justices, the majority, ruled that based on the facts in evidence that had been presented prior to trial, the firefighters were entitled to total victory and be able to win their lawsuit. This is a pretty significant reversal, I have to say.

The question is: Did she allow her prior experiences and beliefs to impact her decision in that case? I point out that she was an active member of the Puerto Rican Legal Defense Fund, where she spent a number of years working on cases such as this and filing litigation and challenging promotion policies in cities around the country, which is a legitimate thing for a group to do. But they did take a very aggressive standard criticizing tests and the standardized process of testing.

Of course, her stated philosophy is that a judge should use life experiences in reaching decisions. We do know she believes a judge is empowered to utilize his or her personal "opinions, sympathies, and prejudices" in deciding

cases. We do know her particular life experiences with the Legal Defense Fund were contrary to the claims brought by the New Haven firefighters. We know she was a leader and board member and chair of that organization's litigation committee. According to the New York Times, she "met frequently with the legal staff of the organization to review the status of cases." According to the New York Times, "she was involved and was an ardent supporter of their various legal efforts." She oversaw, as a board member and litigation chair, several cases involving the New York City Department of Sanitation, which challenged a promotion policy because Hispanics comprised 5.2 percent of the test takers but only 3.8 percent had passed the test. They declared that was an unfair result and challenged the test. Another involved the New York City Police Department on behalf of the Hispanic Police Society. Another one involved police officers in a discrimination case challenging the New York City Police Department's lieutenants exam, claiming that exam was biased.

Under her leadership, the Puerto Rican Legal Defense Fund, before she became a judge, involved itself in a series of cases designed to attack promotion exams because the group concluded that after the fact, after the test, not enough minorities were being promoted. It sounds a lot like this firefighters case we talked a good bit about so far.

We are left to wonder what role did the judge's personal experiences play when she heard the case. Did her personal views, as she has stated, "affect the facts she chose to see?"

The PRESIDING OFFICER. The Republican time has expired.

Mr. SESSIONS. Madam President, I ask unanimous consent for 1 additional minute.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SESSIONS. Madam President, those are important questions, and we will ask about them and give her full and ample opportunity to respond. I did wish to raise these issues.

The firefighters were denied promotion, and under her stated philosophy, her prior background, they are left to wonder: Was perhaps the reason they lost in her court because she brought her background and her prejudices to bear on the case and did not give them a fair chance? Very few cases are taken by the Supreme Court, but the Supreme Court did take this one, to the benefit of the firefighters, and reversed this decision. All nine Justices concluded the decision was improperly done and should be reversed, and five of them rendered a verdict in favor of the firefighters on the record as existed then.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

## ORDER OF PROCEDURE

Mr. DURBIN. Madam President, it is my understanding the Senator from North Carolina is going to make a unanimous consent request; is that correct?

Mr. BURR. Madam President, the Senator is correct. I believe the Senator from Nebraska, as well. I ask unanimous consent to be recognized after the Senator from Nebraska, it is my understanding, for up to 10 minutes as in morning business.

Mr. DURBIN. The time suggested for the Senator from Nebraska is how much?

Mr. JOHANNIS. Madam President, I anticipate 10 minutes, and I ask unanimous consent to speak for 10 minutes.

Mr. DURBIN. My only hesitation is the fact that we are having a Senator sworn in at 12:15 p.m., and there is going to be a speech given before that by his colleague. We also wanted to have opening statements on the bill. If I may ask the Senators—I will not object—but if I may ask them to be closer to the 5-minute mark, I think we can achieve all that in a timely fashion. I ask unanimous consent that the Senator from Nebraska be recognized for 5 minutes—

Mr. JOHANNIS. Five minutes.

Mr. DURBIN. In morning business and that the Senator from North Carolina be given up to 10 minutes. I know he said he would not use up to 10 minutes, and we will be protected with whatever time is used by these two Republican Senators being allocated to the Democratic side for morning business, which we will not likely use. I make that unanimous consent request.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Nebraska.

## HEALTH CARE

Mr. JOHANNIS. Madam President, I spent several days during the recess hosting a series of discussions on health care. I met with doctors and hospitals, underwriters, small business owners, and uninsured Nebraskans. Many of them feel as if they are one illness away from a crisis. The economic slowdown has only heightened this fear as they worry that they may lose their job and the health insurance their family depends upon to stay healthy.

Their concerns are real, and Congress should act carefully to address them. We need to create a health care system that protects patient rights, let's them see their doctor, and is affordable.

But I am concerned about the discussion that is occurring today. The American people deserve true solutions and should not be led down a path that is fraught with shadowy numbers and unfulfilled promises. Specifically, I have reservations about a government-run public plan. Some have attempted to sugar-coat this new bureaucracy as simply an option. However, the more you learn about it, the more you realize there is nothing optional about it.